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ABSTRACT

University officials and faculty are frequently required to make decisions based on interpretations of disputed facts. By applying the concept of due process within the context of higher education, they can meet legal challenges of contract and constitutional law and the pedagogical demand for justice. To guide their efforts, decision makers can consult a body of case law that has evolved over half a century. The Constitution requires that federal and state governments provide citizens with substantive fairness and certain procedures or "process" before depriving them of life, liberty, or property interests. Courts have intentionally retained flexibility in interpreting these requirements in higher education, and no exact formula exists. The courts have granted tremendous deference to the decisions of administrators and professors. Both public and private schools are legally obligated to fairly and reasonably carry out the requirements of their written and implied contracts with students and faculty, which may parallel the requirements of constitutional due process. A university should promote system-wide respect for these principles by ensuring all official inquiries are predictable and dignified, all stakeholders have proper notice and meaningful opportunity to respond and present evidence, and decisions are made by unbiased officials. (Contains 6 references.) (MSE)

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# Due Process and Higher Education: A Systemic Approach to Fair Decision Making

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# Due Process and Higher Education: A Systemic Approach to Fair Decision Making

*Ed Stevens*

Justice and due process are inseparable. When facts are in dispute, the ideal of just decision making requires unbiased, principled deliberation. Simultaneously, the constitutional concept of due process demands fundamental fairness in the method by which discretionary power is exercised. In higher education, a link between due process and discretionary justice is crucial. University officials and faculty at all ranks are frequently required to make discretionary decisions based on interpretations of disputed facts. By applying the concept of due process in the context of higher education, they can meet the legal challenges of contract and constitutional law and the pedagogical demand for justice.

To guide their efforts to comply with the requirements of due process, decision makers in higher education can turn to a body of case law that has evolved over the last half century. These cases, which address criminal procedure, administrative law, and a range of constitutional issues, underlie an approach to fair, or "systemic," decision making, which can be used as a guide in the principled resolution of disputed facts in the academic setting. Approaching disputes from the perspective of due process not only protects educational professionals from legal liability, but also provides a method whereby the resolution of disputes can serve pedagogical and therapeutic purposes.

The concept of due process has come to embody the essence of fair decision making in criminal, civil, and administrative law. Due process generally requires adequate notice and a meaningful opportunity to be heard, but these requirements involve intertwined substantive and procedural considerations. A systemic approach to the provision of due process in higher education ensures fair decision making in higher education.

## What Is Due Process? When Are Due Process Procedures Required?

The phrase "due process" is found in the Fifth and Fourteenth Amendments to the U. S. Constitution, which require that the federal and state governments (respectively) provide citizens with substantive fairness and certain procedures or "process" before depriving them of life, liberty, or property interests. In an extreme case, when a government prosecutor proposes to take a citizen's life as punishment for a crime, that citizen is due, for example, an attorney, a trial before an unbiased judge, and an automatic appeal to the Supreme Court. Similarly, when a state government, acting through its publicly funded university, proposes to punish a medical student for misconduct by taking from her the opportunity to continue to study at the school, the school must first notify the student of its intentions and provide a hearing in accordance with procedures appropriate to the deprivation. The courts have intentionally retained flexibility in the interpretation of the requirements of due process in higher education, and no exact formula exists for the process due in any individual situation.

## What Are the Expectations of the Courts With Regard to Due Process in Higher Education?

The courts have granted tremendous deference to the decisions of administrators and professors in higher education. Before the 1960s, it was extremely rare for a court to even consider the propriety or fairness of a college's academic evaluation or disciplinary action (Wright, 1969). Schools were said to stand in loco parentis with respect to their students and assumed to act in their best interests. That broad discretionary authority has diminished considerably in recent decades. Modern courts require that university policies and regulations not infringe upon the established constitutional rights of professors or students. If a school decides to deprive a student or employee of a constitutionally protected interest, it must provide notice and a hearing commensurate with the interest at stake. The courts continue to allow institutions of higher education considerable

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discretion in deciding how due process protection shall be provided, and interfere with academic and disciplinary decisions only when constitutional standards are clearly violated.

**How Do Legal Requirements for Fair Decision Making Differ in Publicly Supported and Private Institutions?**

The Fourteenth Amendment requires a publicly funded university, as an arm of the state government, to provide due process before depriving an individual of protected liberty or property interests. Under contract law, a private college may be held to this same standard if it promises in official literature to provide due process in connection with disciplinary action against members of the institutional community. Both public and private schools are legally obligated to fairly and reasonably carry out the requirements of their written and implied contracts with students and faculty. These contractual duties may parallel the requirements of constitutional due process, depending on the legal interpretation of the wording of the documents that create the contracts.

**How Does the Systemic Approach to Due Process Differ From Other Methods of Providing Due Process in Higher Education?**

A number of recent publications have promulgated model student codes (Pavela, 1990; Stoner & Cerminara, 1990), model hearing procedures (Bienstock, 1996), and other systems for complying with the demands of administrative and constitutional law in higher education. But no single code or procedural model can anticipate and address the countless variations in circumstances likely to arise. The systemic approach relies less on specificity in regulations and consistency in hearing procedures and more on an understanding, throughout the institution, of the principle of due process.

Those involved in official proceedings tend to evaluate procedural justice on the basis of perceived neutrality; fairness appears to be defined in terms of perceived bias, honesty, and fact-based decision making (Lind et al., 1990). But participation, dignity, and trust could be more important determinants of judgments about the fairness of judicial proceedings. Based on a growing body of research in "therapeutic jurisprudence," it can be said that when people have the opportunity to actively participate in hearings where they are treated with dignity and respect, they tend to have greater trust in those who conduct the hearings and are more receptive to the decisions rendered (Wexler & Winick, 1996). This principle has important implications for due process hearings in higher education.

Due process is not a single event that occurs in isolation. A university should promote system-wide respect for the principles of due process by ensuring that all official inquiries into disputed facts are conducted in a predictable and dignified manner, that any members of the institutional community who face official action adverse to their protected interests receive proper notice and a meaningful opportunity to present and respond to evidence, and that academic and disciplinary decisions are made by unbiased officials. Compliance with the essential principles of due process in the context of higher education will reduce institutional and personal liability, and will lead to fair and just outcomes.

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